86-85

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LOUIS KENNETH RISKEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether, after Congress had amended former 18 U.S.C. §1503 by deleting all references to the word "witness" and enacting the Victim and Witness Protection Act, 18 U.S.C. §1512, providing specific protection to witnesses, the Petitioner could be charged and convicted of violating both 18 U.S.C. §1503 and 18 U.S.C. §1512 based on the same act or conduct directed against a witness before a grand jury.

II.

Whether Petitioner's statement to a witness subpoenaed to testify before a federal grand jury, that he was only joking when he attempted to hire a person to kill a union official, which statement amounted to no more than a protestation of innocence, is the type of conduct, even if false, proscribed by 18 U.S.C. §1503 and 18 U.S.C. §1512(a)(1) as an obstruction of justice.

III.

Whether the Government's failure to disclose exculpatory evidence of an implied agreement to make substantial payments to the government's chief witness violated petitioner's right to due process and applying the standard of materiality there is a reasonable probability that the result of the trial would be different.

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 788 F.2d 1361. It appears in the appendix hereto.

The judgment of the United States Court for the Southern District of Iowa was not reported. The judgment appears in the appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 18, 1986. Petitioner filed a petition for rehearing and suggestion that the case be heard En Banc on April 29,

1986, which was denied on May 22, 1986. This petition is being filed within sixty (60) days of that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutes: 18 U.S.C. Section 1503, 18 U.S.C. Section 1512(a)(1) and 18 U.S.C. Section 1512(a)(2)(A). The pertinent text of these statutes is set forth as Appendix F, p. A-43.

STATEMENT OF THE CASE

In February 1984 a federal grand jury in the Southern District of Iowa was investigating possible criminal violations of federal labor laws, including kickbacks, unlawful investments or loans, and the improper administration of the union health and welfare plan. The target of the grand jury investigation was Teamsters Local 147 and its president Vernon N. Bennett. On March 21, 1984, Bennett was subpoenaed to testify before the grand jury, but on advice of his attorney, asserted the Fifth Amendment privilege against self-incrimination.

The Petitioner had previously been subpoenaed to testify before the grand jury concerning his selling insurance to Teamsters Local 147, his relationship with Bennett and his role in the administration of the union health and welfare plan.

On May 15, 1984, Randall Cason went to Petitioner's office to borrow money. Cason was accompanied by Thaddius Greenfield. Cason talked to the Petitioner alone. Petitioner asked Cason if he could find someone to perform a "contract" killing of a "union man" who was currently "involved" in a federal grand jury investigation and that Petitioner was afraid that the "union man" could "cause him a problem".

Cason rejoined Greenfield and related his conversation with Petitioner. Unknown to Cason, Greenfield occasionally worked as an informant for the FBI.

Greenfield, the next day, reported what he had heard from Cason to an FBI agent who told Greenfield to see if he could determine the identity of the "union man" and then report back.

On May 18, Greenfield had Cason call and advise Petitioner that someone would be calling the Petitioner. Greenfield, using the name Joe White, arranged a meeting with Petitioner at a local discount store. During this meeting, Petitioner offered Greenfield $2,000 to kill a man whom Petitioner identified only as a "big shot" in the Teamsters who could hurt him in a federal grand jury hearing. Petitioner gave Greenfield $30 and they arranged to meet again the next morning.

The next morning, May 19, they met again. Greenfield taped the conversation with Petitioner using a concealed small tape recorder he had borrowed. Petitioner gave Greenfield an additional $50 for expenses and then told Greenfield that the person to be killed was at that time out of town, but would be returning to attend a niece's high school graduation, and was generally "available" during the morning from 7:00 to 8:30 a.m. Petitioner also asked Greenfield if he had a silencer. Greenfield answered that he did and Petitioner responded that that would be necessary. Petitioner also assured Greenfield that his intentions were serious and "for real".

On May 21, 1984, Greenfield informed the FBI of these developments. On May 23, 1984, Greenfield called Petitioner's office from the local FBI office. The call was recorded by the FBI. Petitioner agreed to meet Greenfield the next morning. On May 25, 1984, Greenfield, wearing a concealed recording device, met Petitioner as arranged. During this conversation Petitioner denied discussing a contract, asking about a silencer or offering Greenfield $2,000 to kill someone. Petitioner instead described their prior conversations as involving a car wash and stated that he could not raise the money to invest in the car wash.

On May 25, the Petitioner was overheard by a gasoline station attendant talking on a pay telephone. Petitioner was heard to say "I tell you they are on the case." "He's being interviewed right now," and "I tell you my source says he is being interviewed right now."

On May 30, 1984, Cason was subpoenaed to testify before the grand jury. After he received the subpoena he contacted the petitioner and asked the Petitioner "what the hell is this?". The Petitioner explained that guy (Greenfield) was an informant and that Greenfield was wired when they talked.

The Petitioner asked Cason what he was going to say. Cason testified that he replied: "I told him I was going to tell them just what happened, what he had told me." The Petitioner then said to Cason "Well, if you do me a favor, I will do you a favor." Cason responded that he couldn't lie because he didn't want to perjure himself and go to jail.

Petitioner then told Cason that the idea of a contract on the union guy was just a joke. That Petitioner was just seeing how far Greenfield would go and that he knew it was a scam.

On June 26, 1984, a Four-Count indictment was filed against Petitioner. Count One charged in substance that Petitioner willfully and corruptly endeavored to influence, obstruct, and impede the due administration of justice in connection with a grand jury investigation by endeavoring to hire a person to cause bodily injury to and kill a union official who was a witness before the grand jury in violation of 18 U.S.C. §1503. Count Two charged in substance that the Petitioner engaged in misleading conduct toward Cason by making false statements to Cason concerning the arrangements which Petitioner had made to hire a person to cause bodily injury to and kill a union official, with intent to influence the testimony of Cason in violation of 18 U.S.C. §1512(a)(1). Count Three in substance charged Petitioner with knowingly and unlawfully attempting to use physical force toward a union official by attempting to hire a

person to cause bodily injury to and kill said union official with the intent to cause or induce the union official to withhold testimony from the grand jury in violation of 18 U.S.C. §1512(a)(2)(A). Count Four in substance charged the Petitioner with knowingly, willfully, and corruptly endeavoring to influence, obstruct, and impede the due administration of justice in connection with a grand jury investigation by making false statements to Cason, a witness before the grand jury concerning the arrangements to cause bodily injury to and kill a union official with intent to mislead him and influence his testimony before the grand jury in violation of 18 U.S.C. §1503.

The attempt to hire a person to kill a union official is the same conduct that is the factual basis for the charges brought in Count One, a violation of 18 U.S.C. §1503 and Count Three, a violation of 18 U.S.C. §1512(a)(2)(A). The alleged false statement to Cason made by Petitioner, to wit that the plan to hire a person to kill a union official was merely a joke and a scam, is the factual basis for the charges in Count Two, a violation of 18 U.S.C. §1512(a)(1) and Count Four a violation of 18 U.S.C. §1503.

On October 5, 1984, Petitioner was convicted by a jury of all four counts charged in the indictment. The Petitioner was sentenced on Count One to a five-year term in the penitentiary; on Count Three he was sentenced to a term of 10 years in the penitentiary to be served concurrently with the sentence imposed on Count One; on Count Two he was sentenced to 10 years in the penitentiary to be served consecutively with the sentence imposed under Counts One and Three; and on Count Four he was sentenced to five years in the penitentiary to be served concurrently with the sentence imposed under Count Two and consecutively with Counts One and Three.

Petitioner's sentences combined total twenty years. Petitioner received a total of ten years on the two counts (Count One and Three) that dealt with the endeavor or attempt to hire a person to kill a union official.

Petitioner appealed his conviction to the United States Court of Appeals for the Eighth Circuit assigning as error the questions presented herein.

After remanding the case for further factual finding by the trial court and after receiving the trial court's findings, the Court of Appeals, in an opinion filed April 18, 1986, affirmed Petitioner's conviction on all counts. Petitioner's request for rehearing and suggestion for rehearing en banc was denied on May 22, 1986.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The Decision Of The Court Of Appeals, Holding That Petitioner Could Be Prosecuted On The Basis Of The Same Conduct For Violating Both 18 U.S.C. §1503 And 18 U.S.C. §1512, Conflicts With The Decisions Of Other Federal Courts Of Appeal On The Same Matter.

The meaning and scope of the omnibus clause of 18 U.S.C. §1503 has been the subject of conflicting interpretations by the federal circuit courts. This conflict has worsened since the 1982 amendment wherein the term "witnesses" was removed from the title and body of the statute. Conflict primarily centers around whether §1503 should encompass witness tampering in any form.

The Court of Appeals in this case held conduct directed toward witnesses is covered by §1503 if such conduct can also be construed as an attempt to detrimentally influence the administration of justice. The holding that tampering with witnesses falls within the ambit of the omnibus clause of §1503 as well as under §1512 is followed in some federal circuits but not in others. In *United States v. Hernandez,* 730 F.2d 895, 899 (2nd Cir. 1984), the court concluded that Congress intended to remove witnesses entirely from the scope of §1503.

However, a different result was reached by the Ninth Circuit in *United States v. Lester,* 749 F.2d 1288 (9th Cir. 1984), and by the Fifth Circuit. *United States v. Wesley,* 748 F.2d 962 (5th Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S. Ct. 2664 (1985). The Seventh Circuit has held that witness tampering may be prosecuted under §1503 if it involves interference with the obstruction of justice. *United States v. Rovetsuo,* 768 F.2d 809, 824 (7th Cir. 1985), *cert. denied,* ____ U.S. ____, 106 S. Ct. 838 (1986). The same problem was presented to the Eleventh Circuit but the court did not give an opinion on this question. *United States v. Brand,* 775 F.2d 1460 (11th Cir. 1985).

The issue presented here is one that is likely to recur. Jurisdictions controlled by the Eighth Circuit will tend to follow this reasoning and prosecutions will continue to charge defendants under both §1503 and §1512. Individuals charged in other circuits that reject these conclusions and follow *Hernandez* will fare better in their jurisdictions. It is necessary to resolve this conflict if uniform results are to be obtained on the application of these federal statutes. See dissenting opinion of Justice White in the ruling denying certiorari in the case of *Wesley v. United States,* ____ U.S. ____, 105 S. Ct. 2664 (1985). The view taken in *United States v. Hernandez,* 730 F.2d 895 (2nd Cir. 1984) is more in accord with the intent of Congress and is more consistent with the requirements of Due Process relating to notice and warning.

Prior to 1982, 18 U.S.A. §1503 was entitled "Influencing or injuring officer, juror or witness generally" and prohibited the influencing or injuring of a court officer, juror, or witness. This rule also included an omnibus clause which prohibited the influencing, obstructing, or impeding of the due administration of justice. After 1982, an amendment was made to §1503 which specifically eliminated the word "witness" from the title and the text of the rule. The omnibus clause was retained.

The Due Process Clause of the Fifth Amendment requires that a criminal statute give fair warning of the conduct it prohibits. U.S. Const. amend. V; *Bouie v. City of Columbia,* 378 U.S. 347, 350 (1964). To do this, it is imperative that the language of the statute be clear and unequivocal in its meaning. Justice Holmes emphasized the importance of warning the world precisely what activities are prohibited and what penalties may be imposed in terms that are clearly understood even though a criminal is unlikely to read the law before he commits a crime. *McBoyle v. United States,* 283 U.S. 25, 27 (1931). Stated more succinctly, the court in *United States v. Harriss* said, "The underlying principle is that no man shall be held criminally responsible for conduct which he could not

reasonably understand to be proscribed." *United States v. Harriss,* 347 U.S. 612 (1954). Applying this idea, the *Harriss* court reasoned that a criminal statute that fails to give an ordinary person notice his conduct is forbidden by law violates a constitutional requirement for definiteness. *Id.*

The "fair warning" principle has been interpreted to (1) require not only certainty as to a statute's meaning but also (2) to require avoidance of the retroactive application of a statute and, (3) to restrict judicial expansion of a statute's construction. *Bouie v. City of Columbia,* 378 U.S. at 362; *Brown v. Ohio,* 432 U.S. 161, 170 (1977); *Marks v. United States,* 430 U.S. 188, 195 (1977); *United States v. Bass,* 404 U.S. at 336, 347-349 (1971). In both *Bouie* and *Marks,* the Court held that the Due Process Clause precluded the application of statutes given effect after the acts of the accused had occurred. *Bouie,* 378 U.S. at 362; *Marks,* 430 U.S. at 196. The Supreme Court also concluded in *Bouie* that the state, in expanding the construction of the statute in question to the point where it was vague, failed to give fair warning that the conduct of the defendants was criminal. *Bouie,* 378 U.S. at 350-352.

Petitioner's position is analagous to the above cases because he is being charged, not retroactively with a new statute enacted after the occurrence at issue took place, but with the old construction of a statute from which the pertinent material has been eliminated in the amended statute. The effect is the same, however. Since the amended statute on its face appears to encompass a smaller class of persons than the original, the client has not been given fair warning that his conduct was forbidden by this law. A reading of the omnibus clause within the context of the amended portions would not indicate that witnesses are included in the scope of the statute at all, and a court that included witnesses in its construction of the law would be guilty of an unforeseeable expansion of the statutory language. The Court has frowned upon such an expansion: "judicial enlargement of a criminal Act by interpretation is at war with a fun-

damental concept of the common law that crimes must be defined with appropriate definiteness." *Id.* at 352 (citing *Pierce v. United States,* 314 U.S. 306, 311 (1941).

In warning that criminal statutes must give reasonable notice of the conduct that will give rise to penalties, the Court has consistently emphasized the conduct must be clearly defined by the legislature and not by the courts. *Liparota v. United States,* 105 S. Ct. 2084, 2089 (1985); *United States v. Bass,* 404 U.S. at 348. If Congressional intent is not clear, then the statute must be construed within its narrowest possible meaning and resolved in favor of the accused. The courts are not free to expand the scope of criminal liability if there is any question as to the meaning of the statute, as this would be an unforeseeable conclusion and violate the Due Process Clause.

From the different conclusions taken by federal appellate courts with respect to the construction of the omnibus clause of §1503, it appears that the reasons underlying the retention of this clause in the amended statute are not clear. Any interpretation that includes conduct towards witnesses would be subject to the question of whether fair warning had been given that such conduct was illegal under this section. If prior Supreme Court decisions are consulted, the answer to this question is an unequivocal no.

On September 14, 1982, the Senate considered a bill called the "Omnibus Victims Protection Act of 1982". (S. 2420). 128 Cong. Rec. S11430 daily ed. September 14, 1982). After a few technical amendments were added to the bill, it was passed on the same day. A similar bill, the "Comprehensive Victim and Witness Protection and Assistance Act of 1982" (H.R. 7191), was introduced in the House of Representatives on September 28, 1982. 128 Cong. Rec. H7732 (daily ed. September 28, 1982). The Senate-passed bill was presented simultaneously and the House voted to insert all the provisions of the House bill into the Senate bill and then passed the amended Senate bill while

tabling the original House bill. Subsequently, both Senate and House committees made a limited number of changes in the house-passed bill and proposed a substitute bill (S. 2420) which passed both Houses on October 1, 1982 and became P.L. 97-291. 128 Cong. Rec. S13064 and H8470 (daily ed. October 1, 1982).

In the House of Representatives, the original Senate Act was replaced by the House version introduced by Rep. Rodino. The House bill was similar in its aims to the Senate bill and was designed to expand victim and witness protection beyond the scope of §§1503, 1505, and 1510. 128 Cong. Rec. H8201 (daily ed. September 30, 1982).

In his description of the purpose and provisions of the House bill, Rep. Rodino clearly indicated that courts have difficulty when attempting to interpret the omnibus clause of §1503. 128 Cong. Rec. H8201 (daily ed. September 30, 1982). One purpose of the new section 1512 was to expand the scope of witness protection to include the broad interpretation of §1503. Added to the prohibition of physical force or threats used to influence the testimony of another in a federal proceeding, was the proly ed. September 30, 1982). He emphasized that the inclusion of this term allowed prosecution under §1512 for conduct that had not previously been prosecuted in districts where the courts did not consider the residual clause of §1503 broader than the specific language in the remainder of the statute. 128 Cong. Rec. H8203 (daily ed. September 30, 1982). No omnibus provision was included in the House bill.

When the substituted version of S. 2420 was considered by the House, Rep. Rodino indicated that "The Senate language will reach thinly-veiled threats that create justifiable apprehension in a victim or witness. It does not reach mere annoyance, however, nor does it reach conduct, for example, that is not intended by the defendant to prevent the witness from testifying in an official proceeding." 128 Cong. Rec. H8469 (daily ed. Oc-

tober 1, 1982). The implication is that annoyance or innocent (unintentional) conduct will not be covered by the new Act.

The new (substituted) version of S. 2420 was passed by both Houses on October 1, 1982.

II.

Certiorari Should Be Granted Because The Decision Of The Court Of Appeals Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be Settled By This Court Relating To The Newly Enacted Victim And Witness Assistance And Protection Act Of 1982.

The broad issue meriting the granting of the Writ of Certiorari is one of first impression presenting a factual situation that is likely to reoccur repeatedly. In a broad general sense the issue involves an expression by a person of an innocent state of mind. In this case, it took the form of a statement that when Petitioner talked to Greenfield about hiring him to kill a union official, it was merely a joke or a scam. This is nothing more than an effort to explain Petitioner's conduct as innocent.

The statements to Cason were no more than a claim as to what Petitioner was thinking at the time. Such a statement does not have the potential to mislead another person nor could it have in any way influenced the testimony of Cason. Such a statement by Petitioner could not mislead the witness Cason with respect to what had occurred, when it had occurred and what was said by the various parties.

Petitioner's statement related only to his own thinking and state of mind at the time the conduct occurred. Cason could have, and apparently did, relate the conversation with Petitioner to the prosecutor or grand jury. How this could have influenced Cason to testify other than as he did is not explained.

The Court of Appeals deduces from the verdict of guilty that Petitioner's claim that he was joking was necessarily found to be

false. However, the Court of Appeals does not explain how the statement by Petitioner, even if false, could have misled Cason or influenced his testimony.

Petitioner's statement that he was only "joking" followed Cason's statement that he intended to tell the truth as to what had occurred. By revealing his conversation with Petitioner he apparently did just that. Of course, the fact that Cason was neither misled or influenced by Petitioner's statement does not resolve the question. On the other hand, it underscores the absence of evidence that Petitioner's statement was meant to be more than an expression of opinion of his state of mind or that it was understood any differently by Cason.

There is no indication in the legislative history of 18 U.S.C. §1503 or §1515 that remarks which are not intended to have an affect on the testimony of witnesses are sufficient for a conviction under either statute. Section 1503 no longer covers witnesses and, prior to 1982, when it did, it would have been necessary to prove the witness was influenced in some manner and/or there was an endeavor to influence the witness. Section 1512 is broader than §1503 but still requires that the accused person intended to influence a person in a manner that would adversely affect an official proceeding.

Courts have been divided in their interpretation of the omnibus clause of §1503: Prior to 1982, confusion centered around the nature of the conduct prohibited by the clause. See, e.g., *United States v. Metcalf,* 435 F.2d 754 (9th Cir. 1970); *United States v. Essex,* 407 F.2d 214 (6th Cir. 1969); *Haili v. United States,* 260 F.2d 744 (9th Cir. 1958). Since the statute was amended, considerable controversy has been directed to determining if activities toward witnesses are excluded from the proscribed conduct. See, e.g., *United States v. Rovetsuo,* 768 F.2d 809 (7th Cir. 1985), *cert. denied,* ____ U.S. ____, 106 S. Ct. 838 (1986); *United States v. Beatty,* 587 F. Supp. 1325 (E.D.N.Y. 1984); *United States v. Hernandez,* 730 F.2d 895 (2nd Cir.

1984). In the present situation, the accused was convicted on the presumption that the omnibus provision of §1503 prohibited his conduct which intended to knowingly influence the due administration of justice.

Leaving aside the fact that the Petitioner's statement was made to a witness, it is unlikely that a conviction could be sustained under the omnibus clause of §1503. To establish its case, the government must show that the accused threatened or corruptly endeavored to influence, obstruct, or impede the due administration of justice. *United States v. Brand,* 775 F.2d 1460, 1464 (11th Cir. 1985); S. Rep. No. 97-532, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2515, 2520-21. If no threat was made, then a corrupt motive must be proven to have prompted the offending conduct. Innocent acts or statements made without intent to intimidate or influence the testimony of another are not covered by §1503. S. Rep. No. 97-532, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2521. Although the statement made by the Petitioner may have been false, false remarks alone do not constitute an obstruction of justice; they do not indicate by themselves a corrupt intent or endeavor to influence or interfere with a witness. *United States v. Brand,* 775 F.2d at 1467. Even considering the extremely broad scope given §1503 by some courts, it is unlikely that the statement made by the Petitioner to the witness could be construed as "urging, suggesting or instructing another to give misleading testimony before a Grand Jury..." *United States v. Beatty,* 587 F. Supp. at 1332. There is no indication that the accused's statement was meant as such an attempt but rather is more likely to come under the definition of constitutionally-protected conduct.

For similar reasons, the conviction under 18 U.S.C. §1512(a)(1) should not be sustained. Although, §1512 is intended to encompass a wider range of conduct than §1503 and by definition covers witnesses, it is clear that Congress intended to prohibit the conduct described herein, because it was done knowingly to compel or mislead another into withholding infor-

mation or giving false testimony. As Rep. Rodino pointed out when describing the scope of §1512, the statute was not meant to encompass conduct that was not intended to impede the testimony of a witness. 128 Cong. Rec. H8469 (daily ed. October 1, 1982). By the definition in §1515, the Petitioner may have engaged in misleading conduct by knowingly making a false statement but there is no evidence to show that he did so to encourage the witness to testify other than truthfully (as required by §1512(a)(1)). This is an important distinction which draws the line between prohibited behavior and constitutionally-protected conduct. In the construction and modificaiton of §1512, what has happened to the accused is a violent reduction of his status from that of an ordinary citizen with rights of free speech to the status of a person in such jeopardy of being found guilty of a crime, that his whole existence is being considered only by his relationship to the individual parties in the potential or ongoing judicial proceeding. Thus he has lost all other consideration with respect to his civil rights.

III.

Certiorari Should Be Granted Because The Court Of Appeals Decided An Important Question Relating To Failure To Disclose Exculpatory Evidence In A Way That Conflicts With Applicable Decisions Of This Court.

The trial court, following a remand from the Court of Appeals, made detailed findings of facts and conclusion regarding post-trial payments made to the chief government witness. The trial court concluded that before and during the trial there was an implied understanding between an F.B.I. agent and Greenfield about the possibility of a post-trial payment to Greenfield. Greenfield did in fact receive $4,500 following the conviction. This was in addition to $500 received prior to the trial, which had been disclosed to Petitioner.

The Court of Appeals concluded that the government's failure to disclose known evidence favorable to the accused was incompatible with *Brady v. Maryland,* 373 U.S. 83, 87 (1963). However, after applying the standards of materiality required for reversal under *U.S. v. Bagley,* 105 S. Ct. 3375 (1985), the Court of Appeals agreed with the lower court that there was not a reasonable probability that the result of the trial would have been different had the Petitioner had the exculpatory information with which to impeach the witness.

The Court reasoned that the evidence elicited from Petitioner's own mouth that was tape recorded could not be impeached by the impeachment of Greenfield showing his financial state in the conviction of the Petitioner.

However, both the lower court and the Court of Appeals have overlooked the fact that the tape recording of Petitioner's conversations with Greenfield do not identify the person who they are discussing nor do they establish the facts necessary to find federal jurisdiction.

The evidence that tends to establish the identity of the witness and the element of federal jurisdiction is not found in the tape recordings. It emerges only from the testimony of Greenfield.

Had the jury not believed Greenfield, except where corroborated by the tape, they would have had to find that no federal offense had been committed.

Therefore, applying the test of materiality it is reasonably probable that the verdict of the jury would have been different.

CONCLUSION

For the reasons stated herein it is urged that the Petition for Certiorari be granted and the decision of the United States Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2449

United States of America,
Appellee,

v.

Louis Kenneth Risken,
Appellant.

Appeal from the United
States District Court for the
Southern District of Iowa

Submitted: April 10, 1985
Remanded: December 17, 1985
Resubmitted: February 14, 1986
Filed: April 18, 1986

Before LAY, Chief Judge, McMILLIAN, Circuit Judge, and WOODS,* District Judge.

Louis Kenneth Risken appeals from a final judgment entered in the District Court[1] for the Southern District of Iowa upon a

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* The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas, sitting by designation.

[1] The Honorable Harold D. Vietor, Chief Judge, United States District Court for the Southern District of Iowa.

jury verdict finding him guilty of two counts of obstruction of justice in violation of 18 U.S.C. § 1503 and two counts of witness tampering in violation 18 U.S.C. § 1512(a)(1), (2)(A). The district court sentenced appellant to a total of twenty years imprisonment with the provision that appellant would be immediately eligible for parole under 18 U.S.C. § 4205(b)(2).

For reversal appellant argues that (1) the district court erred in denying his motion to dismiss the obstruction of justice counts, counts 1 and 4; (2) Bennett was not a "witness" within the meaning of 18 U.S.C. §§ 1503, 1512; (3) tape recordings were admitted without foundation evidence; (4) prosecutorial threats intimidated a government witness; (5) there was insufficient evidence to support the jury verdict on counts 2 and 4; (6) the district court abused its discretion in denying several defense motions; (7) the district court erred in refusing to give certain instructions to the jury; and (8) the government failed to disclose a substantial, contingent payment to its chief witness.

For the reasons discussed below, we affirm the judgement of the district court.

FACTS

In February 1984 a federal grand jury in the Southern District of Iowa was investigating possible criminal violations of federal labor laws, including kickbacks, unlawful investments or loans, and the improper administration of the union health and welfare plan. The target of the grand jury investigation was Teamsters Local 147 and its president Vernon N. Bennett. Appellant owns the International Insurance Agency. Appellant was subpoenaed to testify before the grand jury on February 23, 1984, and March 21, 1984. The grand jury asked appellant questions about his selling insurance to Teamsters Local 147, his relationship with Bennett and his role in the administration of the union health and welfare plan.

Bennett was also subpoenaed to testify before the grand jury on March 21, 1984. Bennett appeared before the grand jury and, upon the advice of his attorney, asserted the fifth amendment privilege against self-incrimination.

On May 15, 1984, Randall Cason and Thaddius Greenfield drove to appellant's office. Cason wanted to borrow $50 from appellant. When they arrived at the office, only Cason went inside the building. A short time later Cason and appellant left the building and got inside appellant's car. According to the government's evidence, appellant asked Cason if Cason could find someone who would perform a "contract" killing. Appellant told Cason that a "union man" was currently "involved" in a federal grand jury and that appellant was afraid that the "union man" could "cause him a problem." Appellant told Cason that if Cason knew of anyone who would perform the contract, Cason should have that individual call appellant using the name "Joe White."

Cason rejoined Greenfield and told him what appellant had said. Unknown to Cason, Greenfield occasionally worked as an informant for the FBI. Greenfield told Cason that he might be able to help appellant with the contract killing.

The next day Greenfield told FBI special agent William Barrett Root about appellant's conversation with Cason. Agent Root advised Greenfield to see if he could determine the identity of the "union man" and then to report back.

On May 18, 1984, at Greenfield's request, Cason called appellant to let him know that someone would be calling him. Posing as Joe White, Greenfield then called appellant and they arranged to meet at a local discount department store that evening. Greenfield unsuccessfully attempted to contact Agent Root to inform him about the arranged meeting. Later Greenfield and Cason drove to the discount department store. Greenfield parked his car some distance from the store and Cason stayed inside the car. Greenfield walked to the front of the store and

met appellant there as arranged. Appellant offered Greenfield $2,000 to kill a man whom appellant identified only as a "big shot" in the Teamsters who could hurt him in a federal grand jury hearing. Greenfield told appellant that he had come from St. Louis and requested money for expenses. Appellant gave Greenfield $30 and they arranged to meet again the next morning at appellant's office.

On May 19, before meeting appellant as arranged, Greenfield borrowed a small tape recorder in order to record the meeting. Greenfield then went to appellant's office. Greenfield and appellant discussed the "contract" in appellant's car. Greenfield had concealed the tape recorder in his pocket and switched on the tape recorder as he entered the car. Appellant gave Greenfield an additional $50 for expenses and then told Greenfield that the person to be killed was at that time out of town, but would be returning to attend a niece's high school graduation, and was generally "available" during the morning from 7:00 to 8:30 a.m. Appellant also asked Greenfield if he had a silencer. Greenfield answered that he did and appellant responded that that would be necessary. Appellant also assured Greenfield that his intentions were serious and "for real."

On May 21, 1984, Greenfield informed Agent Root of these developments. On May 23, 1984, Greenfield called appellant's office from the local FBI office. The call was recorded by the FBI. Appellant agreed to meet Greenfield the next morning. On May 24, 1984, Greenfield, wearing a concealed recording device, met appellant as arranged. During this conversation appellant denied discussing a contract, asking about a silencer or offering Greenfield $2,000 to kill someone. Appellant instead described their prior conversations as involving a car wash and stated that he could not raise the money to invest in the car wash. Greenfield then asked appellant why he had agreed to meet him in the first place and appellant answered that he had done so out of curiosity.

On May 25, 1984, Agent Root advised Bennett about appellant's recent conduct. Bennett informed Agent Root that he had been out of town during the past week and had returned in order to attend his niece's high school graduation. Bennett also recognized and identified one of the voices on the tape recordings as that of appellant.

Bennett's wife, Dixie Lee Bennett, worked for appellant in his insurance business. On May 25, 1984, Bennett called his wife at work and told her that someone had threatened his life but did not identify appellant. Mrs. Bennett left the office and met her husband at his attorney's office. When she returned to work, appellant asked her where she had been. Mrs. Bennett told appellant that someone had threatened her husband and that she had been at his attorney's office. About an hour later Bennett's attorney called Mrs. Bennett at work and advised her to go home. As she was leaving, appellant asked her where she was going. Mrs. Bennett told appellant that she had been advised to go home and then left.

Shortly after Mrs. Bennett left appellant's office, appellant made a call from a pay telephone booth at a neighboring gasoline station. The gasoline station attendant overheard some of the conversation and heard appellant say "the feds are on the case now," "I tell you they are on the case," "he's being interviewed right now," and "I tell you, my source says he is being interviewed right now." After appellant hung up, the attendant called the FBI.

On May 30, 1984, Randall Cason was subpoenaed to testify before the grand jury. Cason contacted appellant and asked him why he had been subpoenaed. Appellant asked Cason what he was going to say when he appeared before the grand jury. Cason indicated that all he could do was say what appellant had told him. Appellant then told Cason that "it was all a joke" and a "scam" and that he had only gone along with the plan to see how far it would go. Appellant also told Cason that if he would do him a favor, appellant would do a favor for him.

On June 26, 1984, appellant was indicted by the federal grand jury and charged with two counts of obstruction of justice in violation of 18 U.S.C. § 1503 by endeavoring to hire someone to kill Bennett (count 1) and making false and misleading statements to Randall Cason (count 4) and two counts of witness tampering by engaging in misleading conduct toward Randall Cason (count 2) in violation of 18 U.S.C. § 1512(a)(1) and attempting to hire someone to kill Bennett (count 3) in violation of 18 U.S.C. § 1512(a)(2)(A). Following a five-day trial, the jury found appellant guilty of all four counts on October 5, 1984. Post-trial motions were denied. On November 2, 1984, the district court sentenced appellant to a total of twenty years imprisonment.[2] This appeal followed.

OBSTRUCTION OF JUSTICE AND WITNESS TAMPERING

Appellant first argues that he was improperly charged in counts 1 and 4 with obstruction of justice in violation of 18 U.S.C. § 1503.[3] Appellant argues that because the Victim and

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[2] The district court sentenced appellant to five years for count 1, ten years for count 2, to be served consecutively to the sentences for counts 1 and 3, ten years for count 3, to be served concurrently to the sentence for count 1, and five years for count 4, to be served concurrently to the sentence for count 2 and consecutively to the sentences for counts 1 and 3.

[3] 18 U.S.C. § 1503, as amended by the Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248 (1982), provides:

> § 1503. Influencing or injuring officer or juror generally
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> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing

Witness Protection Act (VWPA), Pub. L. No. 97-291, 96 Stat. 1248 (1982), expressly deleted all references to witnesses from former § 1503[4] and enacted provisions such as § 1512[5] that

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magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

[4] Former 18 U.S.C. § 1503 provided:

§ 1503. Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

[5] § 1512. Tampering with a witness, victim, or an informant

(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

specifically provide increased protection to witnesses, § 1503 as amended no longer applies to witnesses. Alternatively, ap-

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(1) influence the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(b) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or disuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined not more than $25,000 or

pellant argues that Bennett was not a "witness" within the meaning of either § 1503 or § 1512 because Bennett had already appeared before the grand jury and refused to testify and was unlikely to be recalled by the grand jury at the time appellant attempted to hire Greenfield to kill him.

Appellant has preserved this argument for appellate review. This argument was raised during trial in the district court and the government responded to defense motions by arguing that appellant had been properly charged under both § 1503 and § 1512.

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imprisoned not more than one year, or both.

(c) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(d) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(e) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(f) There is extraterritorial Federal jurisdiction over an offense under this section.

We reject appellant's argument about the relative scope of § 1503 as amended and § 1512. Similar arguments have been rejected by other circuit courts of appeal. *See United States v. Rovetuso,* 768 F.2d 809, 823-24 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 838 (1986); *United States v. Lester,* 749 F.2d 1288, 1291-96 (9th Cir. 1984); *United States v. Wesley,* 748 F.2d 962, 963-65 (5th Cir. 1984), *cert. denied,* 105 S. Ct. 2664 (1985); *United States v. Beatty,* 587 F. Supp. 1325, 1329-33 (E.D.N.Y. 1984); *see generally* S. Rep. No. 532, 97th Cong., 2d Sess. 15-16 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 2515, 2520-22; Jeffress, *The New Federal Witness Tampering Statute,* 22 Am. Crim. L. Rev. 1 (1984). *But cf. United States v. King,* 762 F.2d 232, 236-38 (2d Cir. 1985) (nonmisleading, nonthreatening, nonintimidating attempt to have person give false information to government held not within scope of § 1512; not within § 1503 because there was no pending judicial proceeding at time defendant sought to have witness give false information), *cert. denied,* 106 S. Ct. 1203 (1986); *United States v. Hernandez,* 730 F.2d 895, 897-99 (2d Cir. 1984) (holding that by enacting VWPA Congress intended intimidation and harassment of witnesses to be prosecuted under § 1512, not § 1503).

As explained in *United States v. Wesley,* 748 F.2d at 963-64 (footnotes omitted),

> [b]efore 1982, 18 U.S.C. § 1503 was entitled "Influencing or injuring officer, juror or witness generally," and it prohibited influencing or intimidating, "any witness . . ., grand or petit juror, or [court] officer" in the discharge of his [or her] duty. The section also contained a residual [or omnibus] clause prohibiting anyone from obstructing or attempting to obstruct the "due administration of justice." In 1982 [in the VWPA], Congress amended § 1503, and removed all references to witnesses. At the same time, [Congress] also enacted 18 U.S.C. § 1512 which focuses solely on the protection of witnesses, informants and crime victims from intimidation. The safeguards af-

> forded by § 1512 are both more extensive and more detailed than those given by § 1503. Congress did not, however, remove the residual [or omnibus] clause of § 1503 in its 1982 [VWPA] amendments.

"The newly enacted section, § 1512, was intended to provide greater protection for witnesses than did § 1503. The new section protects witnesses against being influenced by intimidation and harassment [and misleading conduct] in addition to corruption, threats, or force to which § 1503 was limited." *United States v. Beatty,* 587 F. Supp. at 1331. As further noted in *United States v. Lester,* 749 F.2d at 1292-93 (citations omitted),

> Congress may well have intended to remove the protection of witnesses from section 1503. It by no means follows, however, that Congress intended to reduce the effectiveness of section 1503 in combating "miscarriage[s] of Justice by corrupt methods." Yet this is precisely the result to which [appellant's] urged construction would lead. If witness tampering should fall exclusively under section 1512, and if the accused used a method other than one prescribed in section 1512 (intimidation, physical force, threats, harassment, or misleading conduct), that conduct would no longer be prohibited. Neither section 1503 nor section 1512 would cover it.

We agree and hold that witness tampering is punishable under § 1503. However, the two statutes are not coextensive. For example, § 1512 is not restricted to witnesses but protects "any person" involved in an official proceeding. By comparison, § 1503 protects only "witnesses," as well as grand and petit jurors and court officers, although witness status has been expansively construed and applied. *See, e.g., United States v. Chandler,* 604 F.2d 972, 974 (5th Cir. 1979) (rejecting limitation of "witness" for purposes of § 1503 to only while case is pending in trial court), *cert. dismissed,* 444 U.S. 1104 (1980); *United*

States v. Jackson, 168 U.S. App. D.C. 198, 513 F.2d 456, 460 (1975) (fact that witness was discharged is immaterial to witness status for purposes of § 1503). In addition, § 1512 is expressly not limited to "pending" official proceedings, 18 U.S.C. § 1512(d)(1), or by considerations of admissibility, *id.* § 1512(d)(2), and thus "explicitly covers 'potential' witnesses and those witnesses whose testimony might not be admissible at trial." *United States v. Hernandez,* 730 F.2d at 898. By comparison, "[a] prerequisite to any violation of section 1503 is the existence of a pending judicial proceeding known to the violator. A grand jury investigation is such a proceeding." *United States v. Vesich,* 724 F.2d 451, 454 (5th Cir. 1984) (citations omitted).

Moreover, § 1512 prohibits only specific types of conduct—intimidation, physical force, threats, or attempts to do so, misleading conduct, or harassment. 18 U.S.C. *y* 1512(a),(b); *e.g., United States v. King,* 762 F.2d at 238; *United States v. Lester,* 749 F.2d at 1293. In particular, § 1512 prohibits intimidation and harassment, thus "establishing a lower threshold of criminal activity [than § 1503]." *United States v. Hernandez,* 730 F.2d at 898; *see* S. Rep. No. 532 at 15, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2521 (expanded scope of prohibited conduct to include verbal harassment). As noted in *United States v. Lester,* 749 F.2d at 1293-94 (citations and footnote omitted),

> [t]he omnibus clause of section 1503, by contrast, is broader. It reaches conduct that "corruptly . . . endeavors to influence, obstruct, or impede, the due administration of justice." In decisions prior to the enactment of section 1512, . . . the argument that the omnibus provision covers only activities obstructing justice that involve force, threats, or intimidation [was consistently rejected]. [Section 1503] includes noncoercive witness tampering.

Cf. United States v. King, 762 F.2d at 238 (§ 1512 does not apply to nonmisleading, nonthreatening, nonintimidating attempt

to have person give false information to the government, but may violate § 1503 if there was a pending judicial proceeding at the time); *United States v. Vesich,* 724 F.2d at 454 (noncoercive witness tampering falls precisely within § 1503 when witness prevented from testifying in federal prosecution).

The difference between the scope of § 1512 and § 1503 is illustrated in *United States v. King,* 762 F.2d at 236. In *King* the defendant was charged and convicted of knowingly engaging in misleading conduct toward another person by making false statements in order to hinder and prevent the disclosure to law enforcement agents of the defendant's participation in counterfeiting. The jury found the defendant guilty of violating § 1512 and several other counts, but the district court vacated the verdict on the ground that the facts proven did not amount to a violation of § 1512. The government cross-appealed. The court of appeals affirmed because

> the evidence did not indicate that [the defendant] had misled [the witness] in any way. Rather, "[the defendant], simply and flat-out, tried to persuade [the witness] to lie" to mislead the government. . . .
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> . . . [S]ince the evidence failed totally to support any inference that [the witness] was, or even could have been, misled, the conduct proven by the government was not within the terms of § 1512.

Id. at 237 (other citations omitted), *citing United States v. King,* 597 F.Supp. 1228, 1231 (W.D.N.Y. 1984). The court of appeals noted that prosecution under § 1503 was not possible "because there was no pending judicial proceeding at the time [the defendant] sought to have [the witness] give false information." 762 LF.2d at 238. *Cf. United States v. Lester,* 749 F.2d at 1295-96 (noncoercive and nonmisleading witness tampering during pending judicial proceeding punishable under § 1503, but not § 1512). *But cf. United States v. Wesley,* 748 F.2d at 964 (holding that "urging and advising" a witness to testify falsely is pro-

hibited by § 1512 and § 1503; unclear from published opinion whether there was intimidation or misleading conduct or whether there was a pending judicial proceeding at the time); *United States v. Hernandez,* 730 F.2d at 897-99 (holding that threatening a potential witness violates only § 1512; unclear whether there was a pending judicial proceeding at the time).

Here, the government proved that appellant attempted to hire Greenfield to kill Bennett, a grand jury witness, and that appellant engaged in misleading conduct toward another grand jury witness, Cason. Both types of conduct fall within the terms of § 1512 and § 1503. The government also proved that there was a pending grand jury proceeding known to appellant and that appellant acted with the intent to obstruct the administration of justice.

We also hold that appellant's conviction under both § 1512 and § 1503 is not multiplicious in violation of the double jeopardy clause of the fifth amendment. *See United States v. Wesley,* 784 F.2d at 963-65. Proof of a violation of § 1503 requires proof of the defendant's knowledge of a pending judicial proceeding, which is expressly not an element of a violation of § 1512.

Appellant alternatively argues that Bennett was not a "witness" within the meaning of 18 U.S.C. § 1503 or 18 U.S.C. § 1512 because Bennett had already appeared before the grand jury and refused to testify and was unlikely to be recalled by the grand jury at the time appellant attempted to hire Greenfield to kill him. As discussed above, witness status is expressly not required under § 1512, which specifically refers to "persons" and not "witnesses."

With respect to Bennett's status as a witness for purposes of § 1503, appellant's proposed definition of "witness" is too narrow. In *Odom v. United States,* 116 F.2d 996, 998 (5th Cir.), *rev'd on other grounds,* 313 U.S. 544 (1941), the court held that a person was considered a witness "[i]f he [or she] knows or is supposed to know material facts, and is expected to testify to

them, or be called on to testify." A person's status as a witness continues even when judicial proceedings have already occurred as long as there is a possibility that the person would testify or be called upon to testify in the future. For example, in *United States v. Chandler,* 604 F.2d at 975, the court applied a "pragmatic definition of a section 1503 'witness' in light of the protective purpose of the obstruction of justice statute" and held that a person who had testified at trial remains a witness for purposes of § 1503 while the direct appeal is pending. Here, the grand jury had not concluded its investigation at the time appellant engaged in conduct prohibited by § 1503. Even though Bennett had asserted the fifth amendment privilege, he knew or was supposed to know material facts about the matters under investigation by the grand jury and could have been recalled to appear before the grand jury. Under these circumstances, we hold Bennett was a witness for purposes of § 1503.

ADMISSIBILITY OF TAPE RECORDINGS

Appellant next argues that the district court abused its discretion in admitting the May 19 and May 24 tape recordings into evidence because the government failed to meet the foundational requirements for introducing tape recordings. As discussed above, Greenfield made the May 19 tape recording using a friend's tape recorder and without FBI assistance. The FBI made the May 24 tape recording using a body recording device worn by Greenfield. Appellant argues that the government did not establish the capability of the equipment, the competency of the operator (Greenfield) or the accuracy of the tape recording with respect to the May 19 tape recording. *See, e.g., United States v. McMillian,* 508 F.2d 101, 104 (8th Cir. 1974), *cert. denied,* 421 U.S. 916 (1975). Appellant specifically argues that there were at least eight gaps in the May 19 tape recording and several unidentified speakers, Greenfield was not competent to operate the tape recorder, and there was no proof that the tape recording had not been tampered with.

These arguments are without merit. "The very fact that the tape recording[] exist[s] establishes that the recording device was capable of picking up sounds and taking the conversation offered." *United States v. McCowan,* 706 F.2d 863, 865 (8th Cir. 1983) (per curiam), *citing United States v. Moss,* 591 F.2d 428, 433 (8th Cir. 1979). In addition, Greenfield testified that he learned how to use the tape recorder on the day he made the May 19 tape recording. "This fact, and the fact that [Greenfield] successfully made the tape recording[], satisfied the competency requirement of the . . . *McMillan* test." *United States v. McCowan,* 706 F.2d at 865. Greenfield also identified the tape recording as an accurate record of his May 19 conversation with appellant. The government expert testified that he had examined the May 19 tape recording and that in his opinion the tape recording was authentic, original and continuous except for eight brief erasures, which the expert believed were apparently caused after recording by rewinding and playing back the tape recording. The government expert also tentatively identified the unidentified speakers as background noise. Under these circumstances, the government adequately met the foundational requirements for introducing the May 19 tape recording into evidence.

Appellant also argues that the May 24 tape recording was not voluntarily made because Greenfield improperly induced him to talk. The evidence presented by the government, however, indicated that appellant voluntarily entered into the conversation with Greenfield.

We conclude the district court did not abuse its discretion in admitting the tape recordings into evidence.

PROSECUTORIAL INTIMIDATION OF CASON

Appellant next argues that he was unable to effectively cross-examine Cason, a key government witness, because Cason had been so intimidated by the prosecutor that he was unable to testify truthfully without fear of governmental reprisal. Ap-

pellant argues that before Cason appeared before the grand jury and again before trial, the prosecutor intimidated Cason by threatening to prosecute him for perjury. Appellant argues that this prosecutorial misconduct violated due process and deprived him of his sixth amendment right to present witnesses in his own defense.

The government argues that appellant's characterization of the prosecutor's statements as "prosecutorial misconduct" is unwarranted. The government admits the prosecutor advised Cason about the dangers and consequences of committing perjury. The government argues, however, that such statements were informative and merely cautionary and not intimidating, coercive or threatening. The government further argues that any error was harmless because the prosecutor's "advice" did not in fact prevent Cason from testifying and being cross-examined at appellant's trial.

"It is not improper *per se* for a . . . prosecuting attorney to advise prospective witnesses of the penalties for testifying falsely. But warnings concerning the dangers of perjury cannot be emphasized to the point where they threaten and intimidate the witness into refusing to testify." *United States v. Blackwell,* 224 U.S. App. D.C. 350, 694 F.2d 1325, 1334 (1982) (citations omitted). The prosecutor's statements in the present case do not approximate the sort of governmental misconduct held unconstitutional in the leading case of *Webb v. Texas,* 409 U.S. 95, 98 (1972) (per curiam), in which the trial court gratuitously and at great length admonished only the defendant's single witness not to lie and warned him of the dire consequences of perjury, or in *United States v. Smith,* 156 U.S. App. D.C. 66, 478 F.2d 976, 979 (1973), in which the prosecutor threatened to prosecute the prospective witness for *past* crimes if he took the stand and testified in a pending trial. Rather, the prosecutor's statements in the present case constituted a constitutionally permissible "mere warning" about the dangers of committing perjury. *See, e.g., United States v. Blackwell,* 694 F.2d at 1335;

United States v. Simmons, 216 U.S. App. D.C. 207, 670 F.2d 365, 371 (1982) (per curiam); *cf. United States v. Harlin,* 539 F.2d 679, 681 (9th Cir.) (trial judge's warning), *cert. denied,* 429 U.S. 942 (1976). The prosecutor told Cason about the serious consequences of perjury, including the possibility of prosecution and the range of punishment. The prosecutor's remarks here were limited to warning Cason about the serious consequences of perjury in the context of Cason's testimony in this case; the prosecutor did not threaten to prosecute Cason for other crimes or to retaliate against him if he testified truthfully. *See United States v. Blackwell,* 694 F.2d at 1334 (citing cases involving threats of prosecution for other crimes, reindictment on dropped charges, revocation of probation).

We note, however, that prosecuting attorneys should exercise considerable restraint when advising potential witnesses about the consequences of committing perjury.

SUFFICIENCY OF THE EVIDENCE OF MISLEADING CONDUCT

Appellant next argues that there was insufficient evidence that he engaged in misleading conduct by telling Cason that the plan to kill Bennett was a joke and a scam. Appellant argues that he did not engage in misleading conduct toward Cason because he actually believed that the conversations with Greenfield and the plan to kill Bennett were only a joke and a scam and that he was only attempting to influence Cason to tell what he believed to be the truth. However, in finding appellant guilty of obstruction of justice by attempting to hire Greenfield to kill Bennett, the jury implicitly found that appellant intended to hire Greenfield to kill Bennett and that the plan was not a joke. Thus, by telling Cason that the plan was only a joke, appellant engaged in misleading conduct toward Cason. *Cf. United States v. O'Keefe,* 722 F.2d 1175, 1181 (5th Cir. 1983) (obstruction of justice in violation of 18 U.S.C. § 1503).

TRIAL ERRORS

Appellant next argues that the district court abused its discretion in denying several defense motions. In particular, appellant argues that the district court abused its discretion in denying his motions for continuances, motions to dismiss for failure to produce exculpatory evidence, and motions for mistrial for prosecutorial misconduct. We have carefully reviewed appellant's allegations and find no abuse of discretion.

INSTRUCTIONS

Appellant next argues that the district court erred in refusing to give certain instructions to the jury. Appellant argues that the district court improperly refused to give the "usual" witness credibility instruction and gave inadequate instructions on reasonable doubt, the burden of proof and the presumption of innocence. We have carefully reviewed as a whole the instructions given by the district court and find no error in the instructions as given. The district court did instruct the jury about witness credibility. This instruction is somewhat cursory but adequate. The reasonable doubt instruction given by the district court is taken from 8th Cir. Model Criminal Jury Instructions § 3.11 (1985). The district court did not give separate instructions about the burden of proof or presumption of innocence but expressly stated and repeatedly referred to both principles in other instructions.

NONDISCLOSURE OF PAYMENT TO GOVERNMENT WITNESS

Before trial the district court ruled that government records of any payments made to Greenfield were exculpatory evidence and ordered the government to produce any such records. The government disclosed before trial and presented evidence during trial that the FBI had paid Greenfield $500 in connection with

his work in the present case and $250 in connection with an earlier drug investigation. Under cross-examination Greenfield and FBI special agent Root denied that Greenfield had been promised any additional substantial payment for his investigative work in the present case. Agent Root testified, however, that the FBI paid "on results." At the sentencing hearing on November 2, 1984, defense counsel informed the district court that he had heard that Greenfield would be paid an additional $5,000 and that Greenfield had told others that he planned to go to Hawaii. To this information the prosecuting attorney responded: "I don't know what the basis of [defense counsel's] information is. I don't know the internal workings of the FBI. I am not aware of any trips to Hawaii, or secret agreements, or anything of that nature, that [defense counsel] has urged." The district court denied appellant's motion for disclosure but directed the government to preserve its payment records so that they would be available for examination if necessary. On December 10, 1984, the prosecuting attorney informed the district court and defense counsel by letter that after the trial the FBI had authorized and paid Greenfield $5,000.

Appellant argues that evidence of a potential financial reward which gave Greenfield, the government's chief witness, a direct and personal stake in appellant's conviction could have been used to impeach Greenfield by showing bias or interest and that its suppression denied him due process of law. *See United States v. Bagley,* 105 S. Ct. 3375, 3380-81 (1985); *United States v. Agurs,* 427 U.S. 97, 104-12 (1976); *Brady v. Maryland,* 373 U.S. 83, 87 (1963). Appellant argues that the government's nondisclosure misleadingly induced defense counsel, and ultimately the jury, to believe that Greenfield had received only $500 for his investigative work in the present case. Appellant also argues that Greenfield's testimony should be stricken because the $5,000 payment was in the nature of a reward or "bounty" made contingent upon appellant's conviction, citing *Williamson v. United States,* 311 F.2d 441 (5th Cir. 1962).

The government argues that the nondisclosure claim should not be considered on appeal because it was not raised in the district court. The government argues that appellant should dismiss the present appeal and file a motion for new trial on the basis of newly discovered evidence in the district court. Brief for Appellee at 51 n.11. On the merits the government argues that information about the $5,000 payment was not "suppressed" because the payment was not authorized until after trial and was not paid to Greenfield until after sentencing and, once payment was made, that fact was promptly disclosed to the district court and defense counsel. The government further argues that defense counsel's characterization of the $5,000 payment as a reward contingent upon appellant's conviction is speculative and unsupported by the record.

Because the controversy about the $5,000 payment arose during sentencing and actual payment was not made until two months after trial, we could not rule upon the merits of appellant's nondisclosure claim on the basis of the then-existing record. Accordingly, on December 17, 1985, we remanded the case to the district court for the limited purpose of holding an evidentiary hearing and making findings of fact and conclusions of law. We directed the district court to determine (1) whether there was an agreement or understanding of any kind between the FBI and Greenfield about the possibility of a post-trial payment; (2) if such an agreement or understanding existed, its terms and conditions, including whether any payment was contingent upon conviction; and (3) under the new formulation of the materiality test set forth in *United States v. Bagley,* 105 S. Ct. at 3384, whether there was a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

We appreciate the district court's thorough treatment and prompt disposition of this matter on remand. The district court conducted extensive discovery proceedings, held an evidentiary hearing and made detailed findings of fact and conclusions of

law. *United States v. Risken,* No. 84-44 (S.D. Iowa Feb. 12, 1986) (certified findings and conclusions on remand). The district court found that "no express agreement between Agent Root or anybody else on behalf of the FBI and Greenfield existed in advance of or during the trial concerning a post-trial payment to be made to Greenfield." *Id.* at 8. However, the district court found that

> *before and during the trial there was an implied understanding between Root, on behalf of the FBI, and Greenfield about the possibility of a post-trial payment to Greenfield.* There was no understanding as to the amount of the payment but there was an implied understanding that the making of such payment and the amount thereof might depend on whether [appellant] was convicted. This ultimate fact finding rests on the entire record made at the remand hearing. Among the more compelling evidentiary facts leading to this ultimate fact finding are: Greenfield's past experience in being paid as an FBI informant; the conversation between Greenfield and Root on May 4 [, 1984,] in which Greenfield was told that there would be compensation for reliable information and that the amount would depend upon the guantity and quality of the information; Greenfield had been paid for his services up to May 29 but he had received nothing for his services as a witness in two pretrial hearings and at the trial and for the extensive time he spent being debriefed by government agents in preparation for the trial, and he had received nothing for his degradation in the eyes of his social peers for becoming an FBI informant; Root's contemplation during the pretrial hearings and the trial of the possibility of paying Greenfield more after the trial; the FBI's occasional, if not common, practice of making payments after trial; the FBI's practice of considering a conviction, along with other factors, in deciding whether to make a payment; and last but not least, Greenfield's statements to people during the summer and early autumn of 1984 that he was going to

> receive a large payment or other handsome reward after the trial.

Id. at 8-9 (emphasis added). The district court concluded, however, that there was no reasonable probability that, had the implied understanding been disclosed to the defense, the result of the proceeding would have been different because Greenfield's testimony was corroborated by the tape recordings and "[p]rimarily, it was the tapes that convicted [appellant] on all counts." *Id.* at 9. The district court also concluded that disclosure of the implied understanding in the pretrial hearings would not have changed the ruling on the admissibility of the tape recordings. *Id.* at 10. The parties then submitted supplemental briefs.[6]

First, the fact that the $5,000 payment was contingent upon appellant's conviction would not alone require reversal. In *Williamson v. United States* the Fifth Circuit refused to sanction "a contingent fee agreement to *produce evidence against particular named defendants as to crimes not yet committed.*" 311 F.2d at 444 (Rives, J.) (emphasis added). Later Fifth Circuit cases limited the *Williamson* holding to cases involving similar facts, that is, to "cases in which the government directs the informant to implicate government-pretargeted specific defendants." *United States v. Yater,* 756 F.2d 1058, 1067 (5th Cir.), *cert. denied,* 106 S. Ct. 225 (1985). It is the government's pre-selection or pre-targeting of specific persons for implication by the informant that violates due process, not the fact that the informant's fee is contingent upon conviction. *See, e.g., United States v. Dailey,* 759 F.2d 192, 199 (1st Cir. 1985); *United States*

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[6] In connection with the proceedings on remand, appellant also filed motions to hold the FBI in contempt, for appointment of a special grand jury pursuant to 18 U.S.C. § 3331 and a special prosecutor, and to dismiss all the counts of the indictment. The district court denied these motions, without opinion, by order dated February 18, 1986. Appellant filed a supplemental notice of appeal. We have reviewed appellant's additional objections and find no basis for reversal.

v. Valle-Ferrer, 739 F.2d 545, 546-47 (11th Cir. 1984) (per curiam) (fact that key government witness was eligible to receive a monetary award contingent upon defendant's conviction does not require reversal); *United States v. Walker,* 720 F.2d 1527, 1539-40 (11th Cir. 1983), *cert. denied,* 465 U.S. 1108 (1984). Appellant does not argue that the government pretargeted him for conviction or that Greenfield was directed by the government to specifically implicate him.

We now turn to the nondisclosure claim. In *United States v. Bagley,* 105 S. Ct. at 3377, the Supreme Court reviewed the standard of materiality to be applied in determining whether the government's failure to disclose impeachment evidence warrants reversal of a conviction. In *Bagley,* evidence of the government's prior agreements to pay two government witnesses for their cooperation and testimony was not disclosed to the defense. The defendant filed a 28 U.S.C. § 2255 motion alleging that nondisclosure violated *Brady v. Maryland* because the agreements could have been used to impeach the government witnesses. The district court found that the government's failure to disclose was harmless error. The Ninth Circuit reversed, holding that "the government's failure to provide requested *Brady* information to [the defendant] so that he could effectively cross-examine two important government witnesses requires automatic reversal." *Bagley v. Lumpkin,* 719 F.2d 1462, 1464 (9th Cir. 1983).

The Supreme Court reversed. The majority of the Court emphasized that "[t]he holding in *Brady v. Maryland* requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or punishment' . . . and 'that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.' " *United States v. Bagley,* 105 S. Ct. at 3379-80 (Blackmun, J.), *citing Brady v. Maryland,* 373 U.S. at 87, *and United States v. Agurs,* 427 U.S. at 104. The Court expressly rejected any distinction between exculpatory and impeachment evidence for

Brady purposes. *United States v. Bagley,* 105 S. Ct. at 3380-81, *citing Giglio v. United States,* 405 U.S. 150, 154 (1972). The majority stated that "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial," *United States v. Bagley,* 105 S. Ct. at 3381, and reformulated the standard of materiality applicable to non-disclosed evidence, *id.* at 3381-84. The Court replaced the framework for evaluating the materiality of *Brady* evidence established in *United States v. Agurs* with the following test: "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 3384; id. at 3385 (White, J., concurring in part and concurring in judgment). The Court further defined "a reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.* at 3384, *citing Strickland v. Washington,* 466 U.S. 668, 694 (1984).

We have carefully reviewed the record in the present case and conclude, as did the district court on remand, that under the *Bagley* standard of materiality there is no reasonable probability that the result of the trial would have been different had the $5,000 payment been disclosed to the defense and used by defense counsel to cross-examine Greenfield. *See United States v. Bagley,* 105 S. Ct. at 3384; *Fryer v. Nix,* 775 F.2d 979, 983-84 (8th Cir. 1985); *United States v. Ben M. Hogan Co.,* 769 F.2d 1293, 1299 (8th Cir. 1985); *see also United States v. Pflaumer,* 774 F.2d 1224, 1230 (3d Cir. 1985), *cert. denied,* 106 S. Ct. 1263 (1986); *Lindsey v. King,* 769 F.2d 1034, 1041-43 (5th Cir. 1985); *United States v. McKenzie,* 768 F.2d 602, 610 (5th Cir. 1985), *cert. denied,* 106 S. Ct. 861 (1986); *United States ex rel. Smith v. Fairman,* 769 F.2d 386, 391-92 (7th Cir. 1985).

The government should have disclosed the implied understanding that existed between Greenfield and the FBI about the possibility of a post-trial payment. The defense could have used

this information to further impeach Greenfield's credibility. Nonetheless, Greenfield's status as a paid government witness and his employment by the FBI as a paid informant had already been brought out before the jury, although the payments which had been disclosed to the defense and to the jury were substantially less than the post-trial payment. More importantly, however, the government's case did not depend upon Greenfield's testimony alone. *Cf. United States v. Bagley,* 105 S. Ct. at 3386-88 (Marshall, J., dissenting) (government's entire case hinged on testimony of two private security guards who aided government agency in its investigation of defendant; omission of evidence of witnesses' possible bias cannot be held harmless error); *United States v. Pflaumer,* 774 F.2d at 1230. Greenfield's testimony was strongly corroborated by the tape recordings of his conversations with appellant. We agree with the district court that the tape recordings constituted the critical incriminating evidence against appellant. Slip op. at 9. Under these circumstances, we cannot say that the government's failure to disclose the implied understanding between the FBI and Greenfield about the possibility of a post-trial payment is sufficient to undermine our confidence in the jury's verdict.

Our holding that the evidence not disclosed by the government in the present was not material under the *United States v. Bagley* standard should not be construed as approval of the government's conduct. The fact remains that the government's failure to disclose known evidence favorable to the accused is incompatible with *Brady v. Maryland,* even though nondisclosure in a particular case may not warrant reversal under the reformulated standard of materiality set forth in *United States v. Bagley. See United States v. Bagley,* 105 S. Ct. at 3386-90 (Marshall, J., dissenting); *id.* at 3398 & n.1 (Stevens, J., dissenting) (*Brady* violation is by definition constitutional error). As stated by Justice Marshall in his dissenting opinion in *United States v. Bagley,* 105 S.Ct. at 3389 (citations omitted),

> "[t]he purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one." When evidence favorable to the defendant is known to exist, disclosure only enhances the quest for truth; it takes no direct toll on that inquiry. Moreover, the existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty. . . .
>
> When the State does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and thereby undermines the reliability of the verdict. . . . [T]he State's concern for a fair verdict precludes it from withholding from the defense evidence favorable to the defendant's case in the prosecutor's files.

Accordingly, the judgment of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2449-SI

United States of America,
Appellee,

vs.

Louis Kenneth Risken,
Appellant.

Appeal from the United States District Court
for the Southern District of Iowa

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

Appellant's motion and application for stay and to continue bond is denied.

May 22, 1986

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Docket No. Cr. 84-44

United States of America,

vs.

Louis Kenneth Risken.

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL: In the presence of the attorney for the government the defendant appeared in person on this date: November 2, 1984 WITH COUNSEL: Philip F. Miller

PLEA: NOT GUILTY

FINDING & JUDGMENT: There being a verdict of GUILTY.

> Defendant has been convicted as charged of the offense(s) of: violation of Title 18, United States Code, Section 1503, as charged in counts 1 and 4 of the Indictment filed herein; violation of Title 18, United States Code, Section 1512(a) (2), as charged in count 2 of the Indictment filed herein; and violation of Title 18, United States Code, Section 1512(a) (2) (A), as charged in count 3 of the Indictment filed herein.

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guily as charged and convicted and ordered that:

> IT IS THE JUDGMENT of the court on Count 1 that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a maximum term of five years and that defendant shall become eligible for parole under 18 U.S.C. §4205(b) (2) immediaely.

IT IS THE JUDGMENT of the court on Count 3 that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a maximum term of ten years and that defendant shall become eligible for parole under 18 U.S.C. §4205(b) (2) immediately. This senence of imprisonment shall be served concurrently with the sentence of imprisonment imposed on Count 1.

IT IS THE JUDGMENT of the court on Count 2 that the defendant is hereby committed to the custody of the Attorney General of he United States or his authorized representative for imprisonment for a maximum term of ten years and that defendant shall become eligible for parole under 18 U.S.C. §4205(b) (2) immediately. This sentence of imprisonment shall be served consecutively to the sentences of imprisonment imposed on Counts 1 and 3.

IT IS THE JUDGMENT of the court on Count 4 that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a maximum term of five years and that defendant shall become eligible for parole under 18 U.S.C. §4205(b) (2) immediately. This sentence of imprisonment shall be served concurrently with the sentence of imprisonment imposed on Count 2 and consecutively to the sentences imposed on Counts 1 and 3.

ADDITIONAL CONDITIONS OF PROBATION: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

/s/ Harold D. Vietor
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2449

United States of America,
Appellee,

v.

Louis Kenneth Risken,
Appellant.

Appeal from the United States District Court
for the Southern District of Iowa

Filed: December 17, 1985

ORDER

This cause is remanded to the district court to hold an evidentiary hearing and to make findings of fact and conclusions of law with respect to appellant's claim that the government failed to disclose the existence and the terms of an agreement or understanding, between the FBI and government witness Thadius Greenfield, about the possibility of a financial reward, which was directly related to the success of the government's prosecution against appellant.

Appellant is to be given the opportunity to produce those witnesses whom the informant told that he was to receive moneys after appellant's conviction; the government shall be required to produce the FBI file and all FBI agents and employees

who have any knowledge whatsoever concerning the payment of the $5,000 following appellant's conviction. The informant himself shall be required to testify as to all facts surrounding the receipt of said payment. On remand the district court should determine whether there was an agreement or understanding of any kind between the FBI and the informant about the possibility of a post-trial payment and, if such an agreement or understanding existed, its terms and conditions, including whether any payment was contingent upon conviction. The district court should then determine whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 105 S. Ct. 3374, 3384 (1985).

The district court is requested to certify its findings and conclusions to this court as promptly as practicable. This court will retain jurisdiction of the appeal pending receipt of the district court's certification, after which we will proceed to decide the appeal.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

District Court Criminal No. 84-44

Court of Appeals No. 84-2449

United States of America,
Plaintiff,

v.

Louis Kenneth Risken,
Defendant.

CERTIFIED FINDINGS AND CONCLUSIONS

A jury found defendant guilty on all four counts of a grand jury indictment and I sentenced him to imprisonment on each count. Defendant appealed. After the appeal was taken, the Federal Bureau of Investigation paid Thaddius "Teddy" Greenfield, a government informant and witness in the case, $5,000. When the payment was made, the chief prosecutor in the case, Assistant United States Attorney Guy Cook, notified Philip F. Miller, defendant's attorney, and me that the payment had been made. Miller brought the payment to the attention of the court of appeals and raised certain factual and legal issues about it.

After submission of the appeal to a three judge panel, the court of appeals, on December 17, 1985, entered the following order:

> This cause is remanded to the district court to hold an evidentiary hearing and to make findings of fact and conclusions of law with respect to appellant's claim that the government failed to disclose the existence and the terms of an agreement or understanding, between the FBI and

government witness Thadius Greenfield, about the possibility of a financial reward, which was directly related to the success of the government's prosecution against appellant.

Appellant is to be given the opportunity to produce those witnesses whom the informant told that he was to receive moneys after appellant's conviction; the government shall be required to produce the FBI file and all FBI agents and employees who have any knowledge whatsoever concerning the payment of the $5,000 following appellant's conviction. The informant himself shall be required to testify as to all facts surrounding the receipt of said payment. On remand the district court should determine whether there was an agreement or understanding of any kind between the FBI and the informant about the possibility of a post-trial payment and, if such an agreement or understanding existed, its terms and conditions, including whether any payment was contingent upon conviction. The district court should then determine whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 105 S. Ct. 3374, 3384 (1985).

The district court is requested to certify its findings and conclusions to this court as promptly as practicable. This court will retain jurisdiction of the appeal pending receipt of the district court's certification, after which we will proceed to decide the appeal.

After extensive prehearing proceedings to implement the court of appeals' instruction concerning production by the government of relevant FBI files and FBI agents and employees having any knowledge of the $5,000 payment, the matter proceeded to hearing before me on the 5th, 6th and 7th days of February, 1986.

I now certify to the United States Court of Appeals for the Eighth Circuit the following findings and conclusions.

FINDINGS OF EVIDENTIARY FACTS CONCERNING THE $5,000 PAYMENT

Thaddius "Teddy" Greenfield is in his mid-fifties. He is a lifelong resident of Des Moines. For about ten years, from late 1959 until 1970, he served the FBI as an informant and he received payments from the FBI for his services. The evidence does not disclose the number of payments, the amounts, or when the payments were made in relation to arrests or convictions that may have resulted from information he provided. There is no evidence that he ever became a grand jury or trial witness in any case.

On May 3, 1984, Greenfield telephoned the Des Moines FBI office and stated that he had worked as an FBI informant in the past and was interested in doing so again. He said he could supply information about drug trafficking.

On May 4 FBI Special Agents William Barrett Root and Mickey Carver went to Greenfield's residence and talked to him about his potential as an informant. Greenfield said he had information concerning narcotics and general criminal activity in a black neighborhood on Des Moines' near north side and he gave the agents some information concerning narcotics trafficking. Root told Greenfield that he would be compensated for information that he provided if its proved to be valuable. Root in effect told Greenfield that the amount of compensation would be commensurate with the quantity and the quality of the information provided. Specific amounts were not mentioned.

Greenfield's drug information proved reliable and on May 14 Root paid Greenfield $250 cash and Greenfield signed a receipt reciting that the payment was for services rendered for the period May 3 through May 8, 1984. (Exhibit 4).

On May 16 Root met with Greenfield and Greenfield told him of a meeting he had with Randy Cason and defendant on the preceding day, May 15. Exhaustive evidence of the events of May 15 and the following days, which led to defendant's indictment and conviction in this case, was presented in defendant's trial and is before the court of appeals. Therefore, those events will not be recited in these findings.

On May 30, a few hours after Greenfield testified before the grand jury concerning defendant, Root paid Greenfield $500 cash. Greenfield signed a receipt reflecting that the payment was for services ($400) and expenses ($100) incurred for the period of May 19 through May 29. (Exhibit 7).

On June 7 a criminal complaint was filed against defendant, and on June 26 he was indicted.

On August 1 I heard numerous motions in the case. Greenfield testified.

In respect to one of the motions, I ruled that written records of payments to Greenfield were of an exculpatory nature because they went to the issue of credibility, and I ordered the government to produce "any written records of payment to Mr. Greenfield." In response to that order, the government produced Exhibits 2 and 5, the FSA blue slips in which Root requested authorization to pay Greenfield $250 for the drug information and $500 for the information concerning defendant. However, the government did not produce the receipts (Exhibits 4 and 7), the checks that were drawn to make these payments (Exhibits 3 and 6), and he informant ledger sheet on Greenfield (Exhibit 20)[1]. When an informer is first paid a ledger sheet is set up on

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[1] Cook told Root to supply him with the documents I ordered produced, and he assumed that the two documents Root delivered, Exhibits 2 and 5, were all there were. Root knew of the existence of the checks and receipts, which he did not produce. Root did not know of the existence of the ledger sheet because he did not know that informant payment ledger sheets were set up and maintained at the divi-

that informant at the FBI's divisional field office with an initial authorized balance of $5,000. Each payment made to the informant is reflected on the ledger sheet and the remaining authorized balance is also reflected. Payment to an informant up to the total amount of $5,000 may be made on the authorization of the special agent in charge of the divisional field office without further authority from FBI headquarters in Washington, D.C. At the time I ordered production of all payment records, the ledger sheet on Greenfield reflected the initial authorized balance of $5,000, the two payments that had been made to him, and a remaining balance of $4,250. The establishment of a ledger sheet is not a commitment to pay an informant $5,000 or any part thereof. It is merely a record of payments that are made and of the balance remaining.[2]

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sional office in Omaha. Apparently the divisional office in Omaha was not contacted concerning the possibility of any documents that might be there. Failure of government law enforcement agencies to fully produce documents the government was required to produce in criminal cases has been a recurring problem in this court. The following cases are examples. In *United States v. Rhatigan,* Cr. No. 81-95, the government failed to produce, until the second day of trial, an item of exculpatory evidence that should have been produced in advance of trial. In *United States v. Auerbach,* Cr. No. 81-26, the government failed to produce at the close of direct examination of a government witness, a government agents, *Jencks* materials. In *United States v. Hawkins,* Cr. No. 84-9, the government failed to produce in advance of trial the substance of an oral statement of defendant that the government offered in evidence and that should have been produced under Rule 16(a)(1)(A). (It is fair to note that Mr. Cook was not the prosecutor in any prior case where the government failed to produce documents.)

[2] Although the ledger sheet is not evidence of a commitment to pay, its production before trial would have been very valuable to the defense. It would have focused attention on the fact that there was authority at the divisional field level to pay Greenfield up to $4,250 more without permission from Washington, and unquestionably would have led to lines of inquiry that would have established that Root was thinking about paying Greenfield more, that the FBI does make post-verdict payments to informants and that a guilty verdict is among the factors that can be considered in making a payment to an informant. (*See* p. 6, *infra.*)

The hearing on August 1 did not conclude in respect to all matters before the court, and hearing on the unfinished matters resumed on August 31. Greenfield again testified.

This case was highly publicized in Des Moines, and from the time of defendant's arrest the role of Greenfield was known to the public. During the summer of 1984 and up to the commencement of the trial, on October 1, Greenfield told friends and acquaintances that he was going to get a lot of money for his assistance to the FBI. Greenfield admitted this in his testimony in the remand hearing, but during the trial and the pretrial hearing he denied making such statements. (Trial transcript at 225; August 1 hearing transcript at 120.) In the remand hearing he still contended that he was not expecting a payment at the time of his trial testimony; he explained that he told his peers he was in order to lessen their disapproval of him for serving as an FBI informant.

On August 24, 1984, Greenfield purchased a used 1975 Oldsmobile from Murray Motors Incorporated. The cost was $1,273 including license plates and tax, and Greenfield paid $340 down and was to pay the balance in installments. He told Michael Murray, the proprietor who sold him the automobile, that he worked for the FBI and that his supervisors were "Barrett and Mickey" (Agents Barrett Root and Mickey Carver) and provided the FBI informant telephone number. He told Murray, who had read about this case and Greenfield's role, that when he got his money from the FBI he would pay off on the car. Greenfield was delinquent in September and when Murray called Greenfield about it Greenfield said that he would pay off the full balance November 7.

Root knew that any payments made to Greenfield in advance of trial would be brought up during the trial and would be "pounded away at" by Miller. He knew that he could make a payment to Greenfield after the trial, and during the pretrial suppression hearing and during the trial Root gave some

thought to the possibility of making a payment to Greenfield after the trial was over. In this connection, Special Agent Robert Keane, the supervising agent at the Des Moines office, testified that payments to informants after their testimony in court are made by the FBI, but he does not know whether it is a common practice. Also, Reginald R. Clay, the supervisor of the informant unit at FBI headquarters in Washington, testified that a conviction of the accused is among the factors that can be considered in making a payment to an informant.

Very shortly after the jury returned its verdicts of guilty on October 5, Cook, Root and Daniel Friedman, who at the time of the trial was an attorney in the criminal division of the general litigation division of the Justice Department and assisted Cook in the trial, were conversing in the United States Attorney's office. Friedman wondered aloud where Greenfield was, and Root responded that he was probably out buying a new car. All three participants in the conversation considered Root's comment to be a jesting quip based on the fact that during the trial Miller, in cross-examining Greenfield, had suggested that Greenfield had made statements to other people indicating that he was going to get, among other things, a new car for his cooperation with the FBI. Although Root made the comment in a jesting sense, as noted above he had been giving thought to the possibility of making another payment to Greenfield.

A week later, on October 12, a discussion occurred in the Des Moines FBI office between Root and Keane. Keane suggested to Root that consideration be given to paying Greenfield an additional amount and Root enthusiastically agreed. After further discussion and investigation into procedures, Root and Keane agreed that $5,000 would be appropriate. Root called Greenfield and told him that he would probably be paid $5,000 more. After some procedural steps and missteps (due to a mistaken belief that divisional authority was only $1,500 instead of $5,000) a $5,000 check was written dated October 25, 1984. On

November 1, the day before defendant was scheduled to be sentenced, the check was brought to Des Moines, cashed, and the cash was placed in the FBI's office safe.

On November 2 defendant was sentenced. Before the sentencing, numerous motions of defendant were heard and ruled on. One of the motions sought production, *inter alia,* of FBI records of compensation to Greenfield. Miller represented to the court that he had heard that Greenfield was being paid an additional $5,000. I asked him if he had any evidence to support his allegations and he offered none. I denied the motion but I directed the government to preserve its records so that they would be available for examination if necessary in any further court proceedings.

After the sentencing Cook called the FBI's Des Moines office and spoke to Keane. (Root was out of town.) He advised Keane of the sentences imposed and also told him of Miller's allegations of a further payment being made to Greenfield and asked if any more payment to Greenfield was planned. Keane replied that a further payment was planned. This was the first Cook knew of plans for further payment,[3] and he told Keane to hold up on the payment pending his review of the matter and told him to have Root come to his office the following Monday, November 5.

On November 5 Cook queried Root about the Matter and Root assured him that no promise had been made to Greenfield in advance of trial to make a post-trial payment. After that, the matter was further reviewed by the United States Attorney's Office and the Justice Department and a conclusion was reached

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[3] Cook had asked Root and Greenfield before the trial if there were any plans to pay Greenfield more, and he was told there were not. After Miller, in his trial cross-examination of Greenfield, suggested that another payment had been promised, Cook asked Root if there was any substance to Miller's allegations and Root replied that there was not.

that there was nothing improper about making the proposed payment. Cook so advised Keane by letter dated December 4, 1984. On that same date, Root paid the $5,000 cash to Greenfield and Greenfield signed a receipt reciting that the payment was for services rendered for the period May 16 to December 3, 1984. Cook then notified Miller and me that the payment had been made.

FINDINGS AND CONCLUSIONS OF ULTIMATE FACT CONCERNING THE $5,000 PAYMENT

I find and conclude, as an ultimate fact, that no express agreement between Root or anybody else on behalf of the FBI and Greenfield existed in advance of or during the trial concerning a post-trial payment to be made to Greenfield.

I find and conclude, as an ultimate fact, that before and during the trial there was an implied understanding between Root, on behalf of the FBI, and Greenfield about the possibility of a post-trial payment to Greenfield. There was no understanding as to the amount of the payment but there was an implied understanding that the making of such payment and the amount thereof might depend on whether defendant was convicted. This ultimate fact finding rests on the entire record made at the remand hearing. Among the more compelling evidentiary facts leading to this ultimate fact finding are: Greenfield's past experience in being paid as an FBI informant; the conversation between Greenfield and Root on May 4 in which Greenfield was told that there would be compensation for reliable information and that the amount would depend upon the quantity and quality of the information; Greenfield had been paid for his services up to May 29 but he had received nothing for his services as a witness in two pretrial hearings and at the trial and for the extensive time he spent being debriefed by government agents in preparation for the trial, and he had received nothing for his degradation in the eyes of his social peers for becoming an FBI informant; Root's contemplation during the pretrial hearings

and the trial of the possibility of paying Greenfield more after the trial; the FBI's occasional, if not common, practice of making payments after trial; the FBI's practice of considering a conviction, along with other factors, in deciding whether to make a payment; and last but not least, Greenfield's statements to people during the summer and early autumn of 1984 that he was going to receive a large payment or other handsome reward after the trial.

BAGLEY DOCTRINE DETERMINATION

It is my determination that there is not a reasonable probability that, had the implied understanding been disclosed to the defense, the result of the proceeding would have been different.

Without the tapes, the government would have had scant chance of gaining convictions. With or without payments from the FBI, the jury would not likely have convicted defendant on the uncorroborated word of Greenfield. But the tapes were in evidence, and they strongly corroborated Greenfield's testimony. Disclosure of the implied understanding to the defense and the jury could not have altered one word on those tapes. Primarily, it was the tapes that convicted defendant on all counts. Also, disclosure of the implied understanding to me in the pretrial hearings would not have altered my ruling on the admissibility of the tapes. I would still have found the foundational requirements of *United States v. McMillan,* 508 F.2d 101, 104 (8th Cir. 1974), *cert. denied,* 95 S. Ct. 1577 (1975), satisfied.

Respectfully submitted.

DATED this 12th day of February, 1986.

HAROLD D. VIETOR, Chief Judge
Southern District of Iowa

APPENDIX F

Statutes

§ 1503. Influencing or injuring officer or juror generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(As amended Oct. 12, 1982, Pub.L. 97-291, § 4(c), 96 Stat. 1253.)

§ 1512. Tampering with a witness, victim, or an informant

(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(b) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined not more than $25,000 or imprisoned not more than one year, or both.

(c) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(d) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(e) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an advisor or consultant.

(f) There is extraterritorial Federal jurisdiction over an offense under this section.